



REPUBLIC OF KENYA



**Joseph Juma Amollo v Republic (Criminal Appeal 2 of 2019)
[2022] KEHC 2039 (KLR) (23 February 2022) (Judgment)**

Joseph Juma Amollo v Republic [2022] eKLR

Neutral citation: [2022] KEHC 2039 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL 2 OF 2019
JN KAMAU, J
FEBRUARY 23, 2022**

BETWEEN

JOSEPH JUMA AMOLLO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon B. Kasavuli (SRM) delivered at Winam in Senior Principal Magistrate's Court in Criminal Case No 472 of 2013 on 29th November 2017)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) and (3) of the [Sexual Offences Act](#) No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#). On June 24, 2014, the Charge Sheet was amended to indicate that the minor was aged fifteen (15) years and not twelve (12) years.
2. He was tried and convicted by Hon B. Kasavuli, Senior Resident Magistrate and sentenced to serve twenty (20) years imprisonment for the offence of defilement.
3. Being dissatisfied with the said Judgement, on February 12, 2019, he lodged the Appeal herein. His Petition of Appeal was undated. He set out five (5) grounds of appeal challenging his conviction.
4. His undated Written Submissions were filed on November 17, 2021 while those of the respondent were dated September 12, 2021.
5. Both parties relied on their respective Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions.



Legal Analysis

6. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
7. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
8. Having looked at the appellant’s and State’s Submissions, the court noted that although the appellant did not include a ground of appeal touching his sentence, he submitted on the same. Thus, it was this court’s considered view that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not he was accorded fair trial;
 - b. Whether or not the Prosecution had proved its case beyond reasonable doubt.
 - c. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Trial Court was lawful and or warranted.
9. The court dealt with the three (3) issues under the following distinct and separate heads.

Fair Trial

10. Ground of Appeal No (1) was dealt with under this head.
11. The State did not submit on this issue. On the other hand, the Appellant had averred that the trial court failed to comply with article 50(2)(j) of the *Constitution of Kenya*, 2010. In his Written Submissions, he stated that he had perused the proceedings and noted that the Trial Court conducted the trial in a fair manner.
12. In the premises foregoing, there was no value to be added in analysing whether or not the Learned Trial Magistrate conducted a fair trial as had been set out in Ground of Appeal No (1) herein.

Proof of Prosecution’s case

13. Grounds of Appeal Nos (2), (3) and (4) were dealt with together under this head as they were all related.
14. The Appellant did not challenge the evidence that was adduced in court to prove that he defiled SA (hereinafter referred to as “the Complainant”). On its part, the Respondent submitted that the Prosecution proved its case against the appellant beyond reasonable doubt and there were no inconsistencies. It argued that all the ingredients of defilement were proved and in this regard, placed reliance on the case of *George Opondo Olunga v Republic* [2016] eKLR where the court stated that the ingredients of an offence of defilement are: identification or recognition of the offender, penetration and the age of the victim.
15. This court considered all the respective written submissions with a view to determining if the Prosecution had demonstrated all the aforesaid ingredients that constitute the offence of defilement.



AGE

16. Notably, the Complainant did not adduce evidence as the Learned Trial Magistrate was satisfied with the Report of Dr A.O. Onyango Consultant Psychiatry at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) dated February 18, 2014 that she had mental retardation and permitted her mother SAO (hereinafter referred to as “PW 3”) to adduce evidence on her behalf as an intermediary in line with section 31(2)(b) of the *Sexual Offence Act*.
17. PW 3 and No 81537 CPL Roselyne Nanjala (hereinafter referred to as “PW 4”) produced a baptismal card from the Archdiocese of Kisumu showing that the Complainant was born on May 3, 1998. The appellant did not rebut this evidence. Bearing in mind that the incident occurred on June 3, 2013, the court was satisfied that the Complainant was aged fifteen (15) years and one (1) month at the time.

Identification

18. According to Patricia Okwach (hereinafter referred to as “PW 1”), she saw the Appellant holding the Complainant’s hand as they walked past her house to his house and heard him say that the Complainant was his sister’s child. After some time, he came back still holding the Complainant’s hand and when he saw her, he let go the Complainant’s hand. They exchanged greetings but she kept a keen eye on him and the Complainant.
19. She then saw him jump over a fence. He was then followed by the Complainant. She followed them to the sugar plantation and she saw him lying on the Complainant having sex with her. He called her three (3) times but he did not respond.
20. On her part, MAO (hereinafter referred to as “PW 2”) testified that PW 1 came to her house and asked her if she knew what the Appellant who was her brother-in-law was doing. She accompanied PW 1 to the sugar plantation and she also saw the Appellant having sex with the Complainant. She also confirmed that PW 1 called the Appellant three (3) times but he did not respond.
21. According to PW 4, the incident occurred between 9.00 am and 10.30 am where visibility was not compromised allowing for proper identification of the appellant herein. This court agreed with the Respondent and the Learned Trial Magistrate that the Appellant was positively identified by both PW 1 and PW 2 and that the identification was by way of recognition.

Penetration

22. As can be seen hereinabove, PW 1 and PW 2 saw the Appellant having sex with the Complainant herein. PW 3 testified that she was informed of the incident by her neighbour whereafter she went home and found the Complainant. She examined her and saw a whitish discharge in her panty. She reported the matter to Kondele Police Station the same day.
23. PW 4 told the trial court that she escorted the complainant to Jootrh where penetration was confirmed. Dr Manpreet Kaursehdeva (hereinafter referred to as “PW 5”) produced the P3 form on behalf of Dr Oduor Michael, whose handwriting he was familiar with. His testimony was that the physical examination showed that the Complainant had been involved in a sexual activity. He added that her hymen was broken and that there was a white discharge from her vagina which evidence was proof that she had been defiled. However, there were no external injuries.
24. Although no DNA test was conducted, this court was satisfied that penetration of the complainant was proved beyond reasonable doubt. In fact, in his submissions, the Appellant admitted that he committed the offence under the influence of alcohol he had taken prior to the incident.



25. In the premises foregoing, although the Appellant appeared to have abandoned Grounds of Appeal Nos (2), (3) and (4) as he did not submit on the same, this court nonetheless found and held that the same were not merited and the same be and are hereby dismissed.

Sentence

26. Although the Appellant did not appeal against his sentencing, he, however submitted on the same. He invoked article 50(2) (p) and (q) of the [Constitution of Kenya](#) and urged the Court to review his sentence of twenty (20) years and replace the same with least severe sentence.
27. He added that prior to his arrest he was a graduate of Bed (Science) from Kenyatta University (1997) and a teacher at [particulars withheld] Secondary School in Muhoroni Sub-County. He explained that he was married to one JAO and that they were blessed with three (3) children and that he was the sole breadwinner as the wife was only a housewife.
28. He contended that he had undergone rehabilitation and reform programs within the prison facility such as Diploma in Health Education, Diploma in Emmaus Bible College, Certificate in Nuru Lutheran Ministries and Certificate in Prisoners Journey. He added that he was currently pursuing two (sic) Diplomas in Lamp and Light and International Institute of Christian Discipline. He pointed out that apart from the various courses, he was teaching his fellow inmates his favourite subjects, mathematics and physics at the Kisumu Maximum Secondary and that he was the current Principal of the School. He added that he was also ordained as a Deacon of SDA church and due to the positive rehabilitation and exemplary discipline he exhibited, he was issued with a recommendation letter.
29. He believed that the skills that he acquired would help him integrate well back to society. He submitted that he was a first offender and was remorseful of the events that led to the offence.
30. He argued further that this court pursuant to the case of Francis Karioko Muruatetu and another vs Republic (eKLR not given) and article 159(1) of the [Constitution of Kenya](#) had the capacity to deal with matters pertaining mandatory nature of sentencing, severity of the sentence and reduction of the same. On its part, the State urged the court to uphold the same as the same was lawful.
31. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. This was reinforced by the Court of Appeal in *Kaingu Elias Kasomo vs Republic* Criminal Case No. 504 of 2010 as was cited in *NNC vs Republic* [2018] eKLR when it had this to say:-

“Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim.”

32. Notably, section 8(3) of the said Act provides that:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

33. In its guidelines of July 6, 2021, the Supreme Court was emphatic that the decision of *Francis Karioko Muruatetu and Another v Republic* [2017] eKLR was only applicable to murder cases and that the said case could not be the authority for stating that mandatory or minimum sentences were inconsistent with the Constitution of Kenya.



34. As the court had determined hereinabove that the Complainant was aged fifteen (15) years and one (1) month at the material time of the incident, the Learned Trial Magistrate imposed the only sentence that was prescribed under section 8(3) of the *Sexual Offences Act*. The said sentence was thus not harsh and/ or excessive warranting any interference and/or disturbance by this court.

DISPOSITION

35. For the foregoing reasons, the upshot of this court's decision was that the appellant's Appeal that was lodged on February 12, 2019 was not merited and the same be and is hereby dismissed. The conviction and sentence be and are hereby affirmed as it is safe to do so.

36. For the avoidance of doubt, any period the appellant may have spent in custody prior to his sentencing shall be taken into account while computing his term of imprisonment as provided in section 333(2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya).

37. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF FEBRUARY 2022

J. KAMAU

JUDGE

